

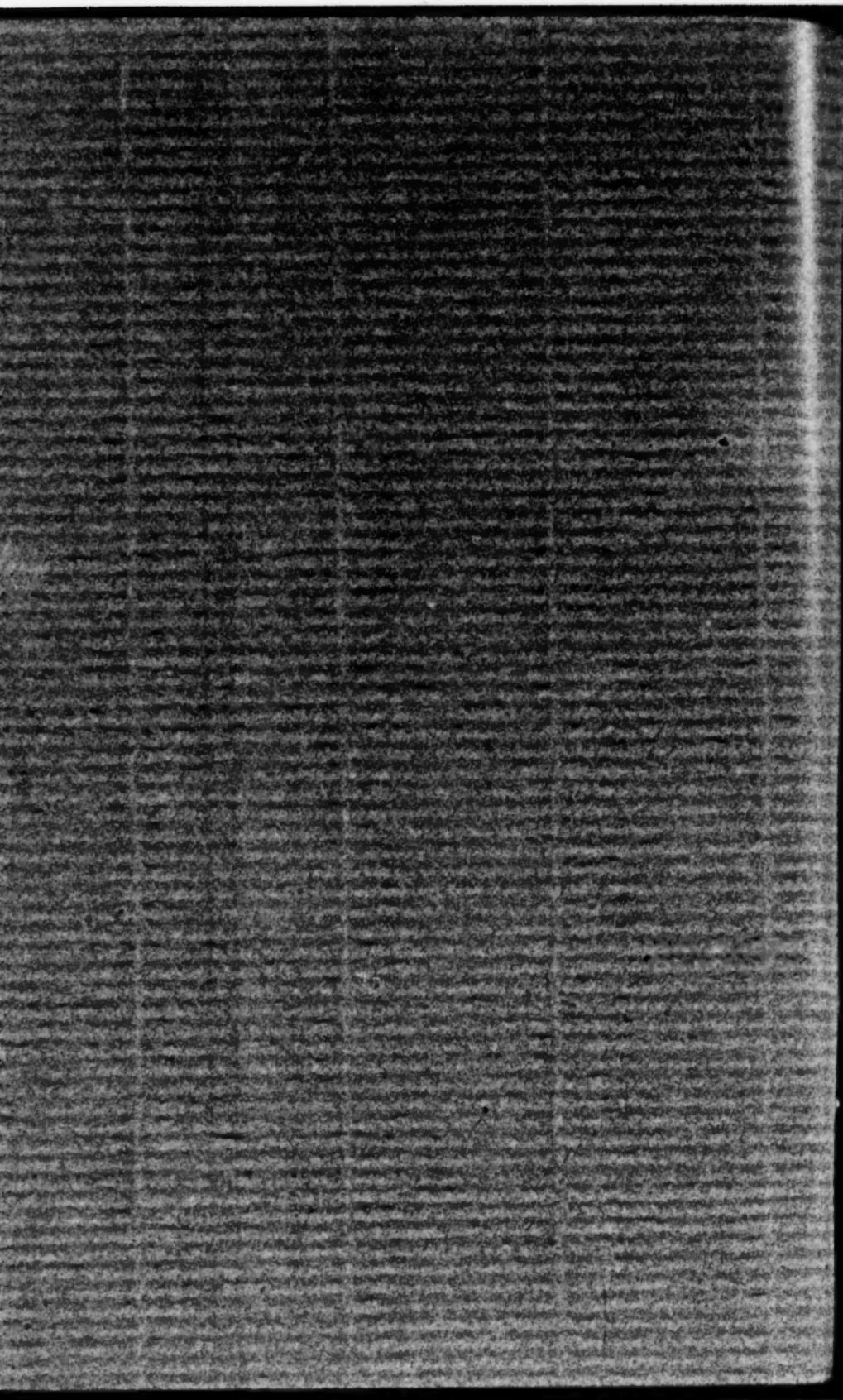
Supreme Court of the United States

RE: FAYCO - THE MUTUAL LIFE INSURANCE COMPANY

OF NEW YORK - Corporation Plaintiff.

PETITION FOR WRIT OF CERTIORARI regarding the "CROWN
TOWER OF ADAMANT" for the Wind Creek to certify to the
Supreme Court for its review and determination the case
of THE MUTUAL LIFE INSURANCE COMPANY OF
NEW YORK, a Corporation, Plaintiff in Error, vs.
WALTER B. ALLEN as Administrator of the Estate
of SAMUEL B. STEWART, Deceased, Defendant in
Error.

PETITION FOR WRIT OF CERTIORARI.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PETITIONER.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of **THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR, vs. WALTER B. ALLEN, AS ADMINISTRATOR OF THE ESTATE OF SAMUEL B. STEWART, DECEASED, DEFENDANT IN ERROR.**

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of the MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows:

I.

That your petitioner is a mutual insurance company, chartered and created under and by virtue of an act of the Legislature of the State of New York, of April 12th, 1842, entitled, "An act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York. That Section 92 of Chapter 690 of the laws of the State of New York of 1892 is as follows:

"No Forfeiture of Policy without notice. No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly-appointed agent or person au-

thorized to collect such premium by or before the day when it fails due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment ; and no such policy shall, in any case, be forfeited, or declared forfeited, or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, and the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." This section was amended by Chapter 218, Laws 1897, by adding the following : "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued "

That in an act of the Legislature of the State of Washington, entitled "An act relating to foreign corporations, and to repeal certain laws in connection therewith," approved March 28th, 1890, the following provisions are contained :

"Section 1. That any corporation incorporated under the laws of any State or Territory in the United States, or of any foreign country, State or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this State, shall have full power, and is hereby authorized to sue and to be sued in

any court having competent jurisdiction ; to acquire, purchase, hold, mortgage, sell, convey or otherwise dispose of in the corporate name all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate by mortgage or otherwise due to, or loans made by such foreign corporations within the boundaries of this State, either prior to or after the passage of this act, and generally to do and perform every act and transact every kind of business within this State, in the same manner and to the same extent as corporations incorporated and organized under the laws of this State are authorized to do under the laws of this State, by a compliance with all the conditions prescribed by the second and third sections of this act."

That prior to the 18th day of February, 1893, your petitioner was transacting an insurance business in the State of Washington, and in compliance with the terms and requirements of said statute, filed and recorded in the office of the Secretary of said State, a certified copy of its charter; it also constituted and appointed F. L. Stinson, residing at Seattle, its agent, that being the place where the principal business of your petitioner was carried on in the State.

II.

Your petitioner states that prior to February 18th, 1893, and until his death on July 9th, 1897, one Samuel B. Stewart resided at Seattle and was a citizen of the State of Washington. That about the 1st of February, 1893, the said Stewart made the usual application in writing for two policies upon his life, in the sum of twenty-five hundred dollars each, to your petitioner. That the application contained the following provisions :

" This application is made to The Mutual Life Insurance Company of New York, subject to the charter of the Company and the laws of the State of New York," and the further provision and condition that the policies to be issued pursuant to the application " shall not take effect until the first premiums shall have been paid and the policies shall have been delivered during my continuance in good health." That after signing the application, said Stewart delivered it at Seattle to the agent of your petitioner, who transmitted it by mail to the principal office of your petitioner on the Pacific Coast at San Francisco, from whence it was mailed to your petitioner at New York City, and your petitioner executed its two policies of life insurance to said Samuel B. Stewart upon his life, in the sum of twenty-five hundred dollars each, and caused the same to be mailed to the said agent at San Francisco, who transmitted them by mail to your petitioner's agent at Seattle, Washington, and that at Seattle, on the 18th day of February, 1893, or shortly thereafter, in exchange for the first annual premium on each policy there paid to your petitioner, it delivered the said policies to the insured.

The following, excepting the provisions of the contracts not affecting this case, is substantially a copy of one of said policies :

" In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York, unto Samuel B. Stewart, of Seattle, in the County of King, State of Washington, his executors, administrators, or assigns, twenty-five hundred dollars, upon acceptance of satisfactory proofs at its home office of the death of said Samuel B. Stewart during the continuance of this policy, upon the

following conditions, and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made a part hereof :

“ Annual premium, \$47.75.

“ The annual premium of forty-seven dollars and seventy-five cents shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the eighteenth day of February in every year during the continuance of this contract.

“ In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary at its office in the City of New York, the eighteenth day of February, A. D. one thousand eight hundred and ninety-three..

“ RICHARD McCURDY,

“ President.

“ C. F. SCHRODER,

“ Assistant Secretary.

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON,

Secretary.

“ Provisions, Requirements and Benefits.

“ Payment of Premiums.—Each premium is due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived.”

That no premium, nor any part of a premium, subsequent to the first, has ever been paid, although the insured knew of the amounts of the premiums and when due, and that your petitioner had, after default in the payment of the second premium, declared the policies forfeited and lapsed, and so entered them upon its books, and so treated them during the life of the insured.

III.

Your petitioner further states that after the death of said Samuel B. Stewart, Walter B. Allen was appointed the administrator of his estate and qualified and entered upon his duties as such, August 28th, 1897, at Seattle.

IV.

Your petitioner further states that on December 28, 1897, the administrator brought suit against your petitioner to recover five thousand dollars, the amount of said policies, with interest, in the United States Circuit Court for the District of Washington, Northern Division, in his complaint setting forth the respective policies and alleging compliance with their terms on the part of the insured during his lifetime and the administrator subsequently. Your petitioner, in its answer, admitted the execution and delivery of the policies, but denied they were entered into in the State of New York, and controverted compliance with the terms of the policies on the part of the insured or the administrator, and asserted as a defense (the defense to each cause of action being separate) that no premium had ever been paid upon either policy, except the first annual premiums paid at the time of their delivery, alleged the contracts were entered into in the State of Washington and

under its laws, and that Samuel B. Stewart had neglected and refused to pay the premiums falling due on the said policies February 18th, 1894, or any part of either, and further alleged that no premium had been paid or anything on account thereof, save the first annual premium on each policy. And as a further defense, your petitioner alleged the payment of the first annual premium on each of the policies at Seattle, Washington, and at the same time the delivery there by your petitioner of the policies of insurance in exchange for such premiums ; and further alleged that it was provided in each of said policies that "an annual premium of sixty-six dollars and fifty cents (\$66.50) shall be paid in advance on the delivery of said policy and thereafter on the eighteenth day of February in every year during the continuance of said contract or policy of insurance," and that it was also provided in the policies as one of the conditions thereof, as follows :

"Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

That the said Samuel B. Stewart had never paid nor offered to pay the premiums falling due February 18th, 1894, and that he was at all times advised and informed that default had been made in each and every premium from the first down to the time of his death in 1897. That your petitioner had entered and noted the policies upon its books as forfeited and lapsed for failure to pay the an-

nual premiums falling due February 18th, 1894, and the insured was advised that your petitioner had so treated the policies, and consented to their forfeiture, and determination, and with this mutual knowledge and understanding between the parties the policies were, after February 18th, 1894, deemed lapsed and terminated ; and relying upon such knowledge and understanding, your petitioner never subsequently mailed or served any notice of the due date of premiums upon the said Stewart during his lifetime, knowing that said Stewart was treating the policies as forfeited, and that in view of the said premises, the parties mutually agreed and consented to the lapsing and determination of the policies from and after February 18th, 1894. Your petitioner states that defendant demurred to the answer and to each of the separate defenses, and the demurrer was sustained by the Circuit Court, to which rulings of the Court your petitioner duly excepted. And your petitioner electing to stand upon its said answer, the said defendant in error moved the Court for judgment according to the prayer of his complaint, against the objection and protest of your petitioner, notwithstanding which the said Circuit Court rendered its judgment against your petitioner in the sum of five thousand and ninety one-hundredths dollars, with interest and costs. That your petitioner feeling aggrieved by the judgment of said Circuit Court, applied to the Circuit Court of Appeals for the Ninth Circuit, for a writ of error for the correction of the manifest errors that happened to the damage of your petitioner as shown by the record and proceedings, as well as in the judgment of said cause, and a writ of error was issued out of said Circuit Court of Appeals, and upon the return of such writ the said cause was argued before said Circuit Court of Appeals, and thereafter and

on the 2nd day of October, 1899, the said Circuit Court of Appeals affirmed the judgment of the said Circuit Court.

V.

Your petitioner states that upon the face of the record of said cause as the same is on file and was presented in said Circuit Court of Appeals, and by the assignment of errors made and presented by your petitioner in said Circuit Court of Appeals, the following questions were and are in issue and involved in the adjudication of said case :

FIRST.

Whether the contracts of life insurance upon which the action was brought, are contracts entered into and governed by the laws of the State of Washington or the laws of the State of New York, and whether said statutes of the State of New York of 1892, requiring notice to be given as therein prescribed, applies to this case or at all in the State of Washington.

SECOND.

Whether actual notice possessed and acted upon by the insured at the time the premiums fell due obviated the necessity of the statutory notice prescribed by the statute of New York, the insured at the time residing in the State of Washington.

THIRD.

Whether, if such statute does apply, the parties could and did waive the notice therein prescribed.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1892, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by said general act.

FIFTH.

Whether it was the meaning of the Legislature of New York that the act of 1892 should apply to a transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said statute follows your petitioner beyond the limits of New York as a part of its charter, or whether the same is operative only within that State upon corporate business there transacted.

SIXTH.

Whether the public policy of freedom of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the contract a Washington contract not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New York of 1892, respecting premium notices, ap-

plies to this case, whether failure to give the notice prescribed by the statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have been knowingly left unpaid.

NINTH.

Whether, although your petitioner failed to give the notice prescribed by the statute of New York, and the premiums due on each succeeding year prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without consideration, to require your petitioner in case of the death of the insured, to pay the policy.

TENTH.

In the event that the statute of New York should be held to apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in the event it is held that the statute of

New York applies to this case, it is a statute relieving the insured from the consequences of a breach of his contract, or whether it enters into the being and charter of your petitioner, and becomes a limit upon its powers of contracting outside of the State of New York.

TWELFTH.

Whether defendant in error, not having begun his action until the 28th day of December, 1897, can, in any event, avail himself of the New York statute, the amendment of which of April —, 1897, is as follows :

"No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed that a forfeiture ensued."

THIRTEENTH.

Whether it is not a fatal departure from law to law for plaintiff, alleging as his cause of action a policy of insurance, and compliance with its terms, and admitting the defense of non-payment of premiums, to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

FOURTEENTH.

Whether under the charter of the defendant Company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Your petitioner states that it has issued and now has outstanding in different states and territories of the Union, many life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the state of Washington, and other corporations created and organized under the laws of the state of Washington have entered into and now have outstanding large numbers of similar policies in such states and territories. That at the time of rendering its opinion in this case, the honorable Circuit Court of Appeals rendered a similar opinion and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error, and that another case in which your petitioner is plaintiff in error has been submitted to the Circuit Court of Appeals, involving the same questions, and a number of like cases are now pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount involved in such litigations, and in view of the difference in judicial opinions respecting the number of questions involved, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court upon a full and fair presentation of the merits of the case (or such of them as the Court may direct) upon the part of your petitioner and the said defendant in error Walter B. Allen as administrator of the estate of Samuel B. Stewart, deceased.

That the Phinney case (No. 12 on the calendar) this Court involves questions under kindred Statutes.

VII.

Your petitioner states that a certified copy of the entire record in said cause in said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application, in conformity with Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of the Honorable Court, directed to the United States Court of Appeals for the Ninth Circuit, certifying the said court to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a Corporation, Plaintiff in Error, vs. Walter B. Allen, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error," No. 519, to the end that the said cause may be reviewed and determined by this Court as provided by section six of an Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
ROBERT C. STRUDWICK,

Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF NEW YORK.

EDWARD LYMAN SHORT being duly sworn, says : That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit ; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me this 18th day of November, 1890.

ALFRED MACKAY,
[SEAL.] Notary Public,
New York County.